Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. .....

79-1108

WILLIAM E. JONES, DONALD L. SCHROEDER, CLAYTON RECORD, A. A. MCCANDLESS, A. NORTON YOUNGLOVE, PAUL R. WILEY, DIRECTOR, and THE DEPARTMENT OF PUBLIC SOCIAL SERVICES FOR THE COUNTY OF RIVERSIDE, EDWARD T. HIMENO, M.D.,

Petitioners,

vs.

WALTRUENT MARGARETE ROSA MORRISON,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

ARTHUR W. VANCE, JR.,
KINKLE, RODIGER AND SPRIGGS,
Professional Corporation,
3393 Fourteenth Street,
Riverside, Calif. 92501,
Counsel for Petitioners.

Date: January 15, 1980.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

Page

Opinion Below 2

Jurisdiction 2

Questions Presented 2

Statutory Provisions Involved 3

Statement of the Case 5

Reasons for Granting the Writ 11

1. The Decision Below Conflicts With Decisions Holding Public Officials and Employees Absolutely Immune From Liability Under Federal Civil Rights Statutes 11

   A. As to Petitioners Jones, Schroeder, Record, McCandless and Younglove 11

   B. As to Petitioner Wiley 13

   C. As to Petitioner Department of Social Services for the County of Riverside 15

   D. As to Petitioner Himeno 16

2. The Decision Below Conflicts With Decisions in Cases With Fact Situations Similar to the Instant Case Wherein the Trial Court Action Was Based Upon Grounds Other Than Immunities, to Wit: 17

   A. The Matter at Hand Is Totally Within the Purview and Jurisdiction of the Courts of the State of California 17

   B. The Damages Alleged by Respondent Are Not Recoverable in a Federal Civil Rights Action 19

Page

Conclusion 19

Appendix. Opinion .....App. p. 1

Order Amending Opinion and Denying Petition for Rehearing 13

Memorandum of Decision 15

TABLE OF AUTHORITIES CITED

Cases Page

Bartlett v. Duty, 174 F.Supp. 84 (1959) 16

Burrus, In re, 136 U.S. 586 (1890) 17

Butz v. Economou, 43 U.S. 478 (1978) 14, 16

Byrne v. Kysar, 347 F.2d 734 (1965) 16

Davis v. United States, 438 F.2d 1118 (1971) 15

Dear v. Rathje, 391 F.Supp. 1 (1975) 19

Denman v. Leedy, 479 F.2d 1097 (1973) 18

Francis v. Lyman, 216 F.2d 589 (1954) 11

Franklin v. Meredith, 386 F.2d 858 (1967) 16

Harris v. Turner, 329 F.2d 918 (1964) 18

Imbler v. Pachtman, 424 U.S. 409 (1976) 12

McLallen v. Henderson, 492 F.2d 1299 (1974) 11, 12, 14

Monell v. Department of Social Services, 436 U.S. 658 (1978) 10, 15

Scheuer v. Rhodes, 416 U.S. 232 (1974) 10

Tenney v. Brandhove, 341 U.S. 367 (1951) 11, 14

Wade v. Bethesda Hospital, 356 F.Supp. 380 (1973) 15

Williams v. Westbrook Psychiatric Hospital, 420 F. Supp. 322 (1976) 16

Woolridge v. Virginia, 453 F.Supp. 1333 (1978) 14

Statutes

California Government Code, Sec. 25200 11

California Government Code, Sec. 25207 .....5, 11

Page

California Welfare and Institutions Code, Sec. 300 4

California Welfare and Institutions Code, Sec. 300(a) 4, 6, 12

California Welfare and Institutions Code, Sec. 600(a) 6

California Welfare and Institutions Code, Sec. 738 .....4, 5, 12, 18

United States Code, Title 28, Sec. 1254(1) 2

United States Code, Title 42, Sec. 1981 ....2, 3, 5

United States Code, Title 42, Sec. 1983 ....2, 3, 5, 10, 16

Textbooks

3 American Jurisprudence 2d, p. 902 19

"The Doctrine of Official Immunity Under the Civil Rights Acts," 68 Harvard Law Review (1955), p. 1231 14

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Petitioners,

vs.

WALTRUENT MARGARETE ROSA MORRISON,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The Petitioners William E. Jones, Donald L. Schroeder, Clayton Record, A. A. McCandless, A. Norton Younglove, Paul R. Wiley, Director, and The Department of Public Social Services for the County of Riverside, and Edward T. Himeno, M.D., respectively pray that a writ of certiorari issue to review the judgment and opinion as amended of the United States Court of Appeals for the Ninth Circuit as to these Petitioners entered in this proceeding on November 26, 1979.

Opinion Below.

The opinion and amendment thereto of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Central Dist ict of California; however, the Memorandum of Decision rendered by the District Court appears in the Appendix hereto.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on October 19, 1979. A timely petition for rehearing was denied on November 26, 1979, on which day the opinion of the Court of Appeals was amended. This Petition for Certiorari was filed within 90 days of October 19, 1979. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

Questions Presented.

1. Whether individual members of a County Board of Supervisors are absolutely immune from liability in a suit under 42 U.S.C. Sections 1981 and 1983, when acting within the scope of their legislative capacities and pursuant to valid State Court order.

2. Whether the director of a local governmental agency; *i.e.*, a public official, is absolutely immune from liability in a suit under 42 U.S.C. Sections 1981 and 1983, when acting pursuant to a valid State Court order in conducting the business of a public agency.

3. Whether a local governmental agency is absolutely immune from liability in a suit under 42 U.S.C. Sections 1981 and 1983 and whether such agency can be held liable under a respondeat superior theory.

4. Whether a physician is absolutely immune from liability in a suit under 42 U.S.C. Sections 1981 and 1983, when acting in a discretionary capacity within the course and scope of his employment by a public entity and pursuant to a valid State Court order.

5. Whether a matter concerning child custody and placement is actionable under 42 U.S.C. Sections 1981 or 1983 or is within the exclusive purview and jurisdiction of the State Court.

6. Whether damages alleging emotional distress only are sufficient to support a claim under 42 U.S.C. Sections 1981 and 1983.

Statutory Provisions Involved.

United States Code, Title 42:

> Section 1981. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> Section 1983. Every person who under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

California Welfare and Institutions Code:

Section 300. Any person under the age of 18 years who comes within any of the following descriptions is within the jurisdiction of the Juvenile Court which may adjudge such person to be the dependent child of the Court.

Section 300(a). Who is in need of proper and effective parental care or control and has no parent or guardian, or has no parent or guardian willing to exercise or capable of exercising such care or control, or has no parent or guardian actually exercising such care or control. No parent shall be found to be incapable of exercising proper and effective parental care or control solely because of a physical disability, including, but not limited to, a defect in the visual or auditory functions of his or her body, unless the court finds that the disability prevents the parent from exercising such care or control.

Section 738. In a case where the residence of a minor placed on probation under the provisions of Section 725 or of a ward * * * of the juvenile court is out of the state and in another state or foreign country, or in a case where such minor is a resident of this state but his parents, relatives, guardian, or person charged with his custody is in another state, the court may order such minor sent to his parents, relatives, or guardian, or to the person charged with his custody, or, if the minor is a resident of a foreign country, to an official of a juvenile court of such foreign country or an agency of such country authorized to accept the minor, and in such case may order transportation and accommodation furnished, with

or without an attendant, as the court deems necessary. If the court deems an attendant necessary, the court may order the probation officer or other suitable person to serve as such attendant. The probation officer shall authorize the necessary expenses of such minor and of the attendant and claims therefor shall be audited, allowed and paid in the same manner as other county claims.

California Government Code:

Section 25207. The board may do and perform all other acts and things required by law not enumerated in this part, or which are necessary to the full discharge of the duties of the legislative authority of the county government.

Statement of the Case.

The case at bar is one of first impression in which Respondent Morrison sues for the alleged unlawful deportation of her (then) minor son, Michael Henschel (hereinafter referred to as "Michael") and for damages for emotional distress resulting from alleged violations of her civil rights under 42 U.S.C. Sections 1981 and 1983 by the Petitioners by means of an alleged conspiracy.

Petitioners Jones, Schroeder, Record, McCandless and Younglove were, at the times pertinent herein, members of the Board of Supervisors of the County of Riverside, California; Petitioner Wiley was the Director of the Riverside County Department of Public Social Services and Petitioner Himeno was a physician employed as a Director of the Children's Psychiatric Unit at Riverside County General Hospital at Riverside, California.

Although Respondent is a United States Citizen, Michael was and is a citizen of Germany, with legal guardianship of his person in his grandparents in Germany, pursuant to judicial order in that country. The alleged events complained of by Respondent occurred during the course of an extended visit Michael made to his mother in Riverside County, California.

On January 12, 1973, by order of the Superior Court of the State of California for the County of Riverside, Juvenile Division, Michael was adjudged a "Dependent Child of the Court" pursuant to California Welfare and Institutions Code, (former) Section 600(a) (now Section 300(a)); the Juvenile Court further ordered Michael's custody and control to be in the Director of the Riverside County Department of Social Services; *i.e.*, Petitioner Wiley, with placement at the Children's Psychiatric Unit at the Riverside County General Hospital.

Subsequently, periodic reviews of Michael's "Dependent Child" status were conducted in the Juvenile Court as prescribed by the California Welfare and Institutions Code. At the review of December 27, 1974, the Juvenile Court ordered the Dependent Child status to be continued with continued placement in a "suitable facility" (presumably the aforementioned Children's Psychiatric Unit where Michael had resided since approximately January 1973) and further ordered that as an alternative placement Michael might be placed with his grandparents in Germany.

On March 25, 1975, the Riverside County Board of Supervisors unanimously approved a request of the Department of Public Social Services for authorization to travel to Germany and travel funds for Michael

and one adult to accompany him on the trip. The request was made pursuant to the Court ordered alternative placement of December 27, 1974. The unanimous vote of the Board on March 25, 1975 consisted of the votes of Supervisors Jones, Schroeder and Younglove; Supervisors McCandless and Record were absent and took no part in that action. On March 25, 1975, the Board approved the travel portion of the request, but ordered the fund transfer portion of the request continued to April 1, 1975 for further Board action.

On April 1, 1975, the Board by the unanimous vote of Supervisors Jones, Schroeder and Younglove authorized the previously requested travel funds; Supervisors Record and McCandless were absent on April 1, 1975, at least from that portion of the meeting concerning the travel funds.

On April 3, 1975, Respondent moved the Juvenile Court for modification of the alternative placement order of December 27, 1974, and the Court ordered the matter set for hearing on April 9, 1975. Also, on April 3, 1975, Respondent filed a Petition for Writ of Prohibition to prevent Petitioner Wiley from placing Michael with his grandparents in Germany. On that same day, the Juvenile Court granted an Alternative Writ of Prohibition, ordering Wiley to desist and refrain from any further proceedings regarding placement in Germany until further order of the Juvenile Court and directed Wiley to show cause before the Court on April 18, 1975 why he should not be absolutely restrained from proceeding further with placement of Michael in Germany.

At the modification hearing of April 9, 1975, Respondent Morrison requested that Michael be returned to her home and that his Dependent Child status be

terminated. An in-Court stipulation was made between Morrison's counsel and a representative of the Department of Public Social Services to continue the matter to May 1, 1975, for a contested hearing; the Riverside County District Attorney was appointed by the Court to present evidence in the contested hearing on behalf of the Department of Public Social Services and the Court stayed Michael's placement in Germany until completion of the contested hearing on May 1, 1975 and further order of the Court. Also, at the hearing of April 9, 1975, Morrison's counsel dismissed the aforementioned Writ of Prohibition based upon the stay of execution of the alternative placement order.

At the close of the contested hearing on May 1, 1975 at which Morrison was present and represented by counsel, the matter was taken under submission by the Honorable Gerald F. Schulte, presiding. On May 5, 1975, Judge Schulte affirmed the order of December 27, 1974, including the alternative placement in Germany and denied Morrison's motion to terminate Michael's Dependent Child status, indicating the Court's finding that it would not be in Michael's best interest to return him to his mother's custody.

On May 9, 1975, Michael was transported from the United States to his grandparents in Germany.

Subsequently, Morrison filed a Notice of Appeal in the State Court and during the pendency of that Appeal (which she later voluntarily dismissed) Morrison caused to be filed the complaint initiating the instant action in the United States District Court for the Central District of California.

Morrison claims that she was not afforded notice of the Board of Supervisors' actions of April 1, 1975

and of the Juvenile Court's order of May 9, 1975. She further claims that her first awareness that plans were underway to transport Michael to Germany was via a local newspaper article on March 27, 1975 and that her first notice that Michael had left the United States came to her by way of a letter from an employee of the Department of Public Social Services which was sent to her subsequent to May 9, 1975.

The complaint initially named, inter alia, Judge Schulte as a party defendant; Judge Schulte was subsequently dismissed therefrom on the ground of absolute judicial immunity and no appeal was taken therefrom.

Morrison then filed a First Amended Complaint for "Conspiracy to Interfere with Civil Rights; Deprivation of Civil Rights; Loss of Consortium and Punitive Damages and for Unlawful Deportation," naming as party defendants therein all of the Petitioners herein as well as the District Attorney and Clerk of the County of Riverside.

Subsequently, all of the aforementioned defendants moved to dismiss Morrison's action in the District Court, which motions were ultimately heard as Motions for Summary Judgment. The several motions were grounded upon various immunities applicable to the individual defendants, Morrison's lack of standing to sue for the alleged deprivation of her son's civil rights, her failure to exhaust state remedies and (essentially) lack of subject matter jurisdiction in the District Court based upon exclusive jurisdiction in State Courts of matters concerning child custody and placement. The motions were supported by affidavits on the part of each individual defendant, essentially attesting that at the times pertinent, each individual defendant was acting

in the capacity and within the scope of their office or employment as officials or employees of the County of Riverside and that at the times pertinent the various defendants did not act as private persons or outside of their aforesaid official or employment capacities.

All of the Summary Judgment Motions were granted by the District Court, which rendered a Memorandum of Decision stating therein the basis for its ruling; *i.e.*, various state and federal law theories of governmental immunity except as to Himeno, regarding whom the District Court held that Morrison had failed to allege facts which would support a finding that his diagnosis as to Michael was conducted negligently or was causative of injury to Morrison. The Memorandum of Decision also notes that nothing in the record indicates that any defendant acted with express or implied malice. (See page 18 of the Appendix hereto).

Morrison then appealed the District Court judgment to the Court of Appeals for the Ninth Circuit which affirmed the District Court judgment as to the County District Attorney and Clerk and, relying upon *Monell v. Department of Social Services,* 436 U.S. 658 (1978), in its holding that local governmental bodies are not wholly immune from Section 1983 liability and that state law immunities cannot override a Section 1983 action, reversed and remanded the matter as to the Petitioners. With reference to qualified immunity, the Court below was of the opinion that the "good faith" standard of *Scheuer v. Rhodes,* 416 U.S. 232 (1974) had not been met insofar as the record on appeal was concerned. The remaining procedural and jurisdictional grounds upon which Petitioners relied on appeal, were by the Court below, denied. (See pages 13-14 of Appendix hereto).

REASONS FOR GRANTING THE WRIT.

1. The Decision Below Conflicts With Decisions Holding Public Officials and Employees Absolutely Immune From Liability Under Federal Civil Rights Statutes.

A. As to Petitioners Jones, Schroeder, Record, McCandless and Younglove.

Section 25200 *et seq.* of the California Government Code endows County Supervisors with legislative and discretionary authority. More specifically, California Government Code Section 25207 essentially authorizes Boards of Supervisors to do and perform all acts and things required by law or which are necessary to the full discharge of the duties of the legislative authority of the County. The voluminous body of California case law grounded upon Section 25207 speaks of discretionary powers, further and numerous implied powers and also administrative and judicial powers, leaving little question as to the Board's status as a legislative body.

The great weight of Federal case law confers immunity for official acts of members of legislative bodies in Federal Civil Rights lawsuits; see *Tenney v. Brandhove,* 341 U.S. 367 (1951) and *Francis v. Lyman,* 216 F.2d 589 (1954).

In *McLallen v. Henderson,* 492 F.2d 1299, 1300 (1974), the Court speaks of the judicial immunity allowed non-judicial officials who "like judges, must not be unduly inhibited to exercise discretionary authority by the constant fear of personal liability for damages. Applied to non-judicial officials, judicial immunity is termed quasi-judicial immunity and examples are prosecuting attorneys and parole board members." The

rationale of *McLallen* appears identical to that in *Imbler v. Pachtman,* 424 U.S. 409 (1976) which confers absolute immunity upon public prosecutors which the Court below upheld as to defendant (but not Petitioner herein) Byron C. Morton in the instant case.

It seems a reasonable argument that County Supervisors acting, as here, pursuant to a valid-appearing State Court order (which order itself was presumably based upon constitutionally valid State statutes; *i.e.,* California Welfare and Institutions Code Sections 300 (a) and 738), should be allowed the same degree of freedom of performance as to their duties as are members of parole boards. Certainly, it would seem that County Supervisors are called upon to participate in far more broad and diverse discretionary activities than parole board members, particularly in the Supervisors' legislative functions regarding the allocation of public funds. And since the Supervisors are elected officials, the proper area of redress for errors committed in their official capacities is provided for at the ballot box or by means of impeachment procedures.

The acts of the Riverside County Board of Supervisors in authorizing travel and attendant funding relative to Michael's trip to Germany were accomplished by means of a valid vote of the Supervisors then present (*i.e., Jones, Schroeder* and *Younglove*) pursuant to a valid court order. To have refused to so act would have constituted an abuse of discretion on their part.

Moreover, Supervisors McCandless and Record were absent and took no part in the acts of March 25, 1975 and April 1, 1975. Since the Board of Supervisors is a public entity (as opposed to a public corporation), the general rules regarding corporate boards

do not seem applicable; *i.e.,* that absent directors are bound by and responsible for valid decisions of the board made in their absence. Therefore, on the basis of their absence alone, it would seem that no argument can stand for liability as to McCandless and Record for decisions in which they did not participate.

As to notice of the Board's action, no specific statutory provision exists mandating notice to specific individuals and the Board's meetings and actions therein are a matter of public record, with the minutes of the Board Meetings furnishing at least constructive notice to the entire community.

The Court below points out in its opinion that the question of the absolute legislative immunity of local legislative bodies has not yet been dealt with by the United States Supreme Court. (See Appendix page 7 hereto).

B. As to Petitioner Wiley.

As Director of the Riverside County Department of Public Social Services which is a public agency and therefore a public entity under the laws of the State of California, Wiley served in an executive capacity involving numerous discretionary acts within the course and scope of his official duties.

While it is conceded that not all state or public officials, servants and employees are entitled to immunity from liability in Federal Civil Rights actions, it is reasonable in the instant case to submit that one cannot function adequately or in fact, at all, as the director of a major public agency without the continual compulsion to make value judgments and decisions concerning departmental acts and functions.

Essentially, Wiley occupies a quasi-judicial position not unlike that of a parole board member in that he was ultimately responsible for the making of recommendations to the Juvenile Court concerning the placement of minor children committed by the Court to his department's jurisdiction. Also, such immunity has been held applicable to a State Director of Welfare in a case where the Court analogized his role to that of a probation officer; see *Woolridge v. Virginia,* 453 F.Supp. 1333 (1978).

In *"The Doctrine of Official Immunity Under the Civil Rights Acts,"* 68 Harvard Law Review (1955) at page 1231, the author cites *Tenney v. Brandhove* (cited *supra*) as a case "in which the Supreme Court held members of a legislative investigating committee immune with regard to their official duties" and further states "the courts have assumed that the Civil Rights Acts were not intended to abrogate totally the common law immunities which attached to broad categories of legislative, judicial and even administrative officials." Also see *McLallen v. Henderson, supra.*

In the case of *Butz v. Economou,* 43 U.S. 478 (1978), the United States Supreme Court held in a suit for damages arising from unconstitutional action, that federal executive officials exercising discretion were entitled to only qualified immunity, subject to those exceptional situations where it was demonstrated that absolute immunity was essential for the conduct of public business. The *Butz* decision conferred absolute immunity upon, *inter alia,* agency officials who were responsible for certain agency proceedings. While *Butz* dealt exclusively with *federal* agency officials, its rationale is analogous to Wiley's position in the instant

case in that there is no question that Wiley's decisions and actions were essential to the conduct of public business; *i.e.,* the functioning of the public agency he headed.

C. As to Petitioner Department of Social Services for the County of Riverside.

The Department of Public Welfare of the City of St. Louis (analogous to the Petitioner Department herein) was held immune from suit under the Federal Civil Rights Act in *Davis v. United States,* 439 F.2d 1118 (1971) and a County Children's Service Board was similarly treated by the Court in *Wade v. Bethesda Hospital,* 356 F.Supp. 380 (1973).

To be sure the foregoing decisions predate the *Monell* decision (cited *supra*). The *Monell* decision, however, dealt with a municipal Social Service agency with regard to that agency's long established policies. In the case at bar, no such established policy, *i.e.,* a continuing course of conduct with regard to certain groups of persons within the agency jurisdiction has been alleged by Respondent Morrison.

Further, although not specifically pleaded in Morrison's First Amended Complaint, it appears that the Petitioner Department was impleaded in the lawsuit under a respondeat superior theory; *i.e.,* that the Department is responsible for the allegedly wrongful acts of its Director and possibly other of its employees. It is therefore noteworthy that the *Monell* opinion states that the doctrine of respondeat superior is not a basis for rendering municipalities liable for constitutional torts of their employees.

D. As to Petitioner Himeno.

Himeno's position in the instant action is analogous, at least in part, to Wiley's, in that Himeno was the Director of a Public (medical) facility, ultimately concerned with the medical care provided the patients treated at that facility. In making recommendations concerning Michael's placement, Himeno was performing acts essential to the function of the public agency; *i.e.,* acts essential for his patient's welfare. As such, Himeno's alleged acts would appear to come within the purview of the *Butz* rationale (cited *supra*).

A fortiori, the premise that the examination of a patient by a physician implies that certain recommendations and actions will flow therefrom is realistic, whether the patient suffers from a common cold or a serious mental illness. Several courts have thus held physicians and hospital directors immune from liability in Federal Civil Rights Actions, when those physicians made examinations of individuals pursuant to court order: see *Bartlett v. Duty,* 174 F.Supp. 94 (1959); *Franklin v. Meredith,* 386 F.2d 958 (1967) and *Byrne v. Kysar,* 347 F.2d 734 (1965). Michael was initially placed in the Children's Psychiatric unit under Himeno's care by order of the Juvenile Court and it therefore is reasonable to conclude that Himeno, in examining, treating and making recommendations concerning Michael, was in fact acting, at least indirectly, pursuant to a valid court order.

Also noteworthy herein, is the case of *Williams v. Westbrook Psychiatric Hospital,* 420 F.Supp. 322 (1976) which held that medical doctors appointed by courts to testify in sanity proceedings are absolutely immune in Section 1983 actions from suits by persons committed following such testimony.

Himeno had a legal duty (by virtue of the Juvenile Court order of January 12, 1973) and a contractual duty (by virtue of his employment by a public facility to which the court had ordered Michael admitted) to treat Michael and make decisions and recommendations regarding his care and placement. It can therefore be argued that because of these duties Himeno lacked discretion to refuse to examine or otherwise treat and make recommendations as to Michael and that as to Michael he did merely what he was legally bound to do.

2. The Decision Below Conflicts With Decisions in Cases With Fact Situations Similar to the Instant Case Wherein the Trial Court Action Was Based Upon Grounds Other Than Immunities, to Wit:

A. The Matter at Hand Is Totally Within the Purview and Jurisdiction of the Courts of the State of California.

The decisions of the State Juvenile Court regarding Michael's Dependent Child status, his custody and placement and all other acts performed with regard to Michael by the Petitioners herein and each of them pursuant to those decisions, were a valid exercise of the police power of the State of California in furtherance of the health, safety, welfare and morals of persons including aliens such as Michael, who are located within the State's borders.

The case of *In re Burrus,* 136 U.S. 586, 593, 594 (1890) states unequivocally that "The whole subject of the domestic relations of husband and wife, parent and child, belongs to and depends upon the laws of the States alone." Further, it is well settled in California and probably all states that in matters of child custody and placement, the best interest of the

minor child (as opposed to parental interest) controls. It must therefore follow that the mere placement of Michael, pursuant to a valid State Juvenile Court order grounded upon California Welfare and Institutions Code, Section 738 was made pursuant to valid jurisdiction in the State Court in what was no more than a matter between parent and child in which the State legitimately sought to protect one of its minor residents. In her lawsuit, Morrison attempts to cloak in the disputed guise of a Civil Rights action, what is essentially a disputed child custody matter; this she cannot do. See *Harris v. Turner,* 329 F.2d 918 (1964) and *Denman v. Leedy,* 479 F.2d 1097 (1973) as representative of the Federal Appellate Courts' traditional reluctance to entertain as Civil Rights actions, what are in actuality, child custody proceedings. With reference to the *Harris* case, which involved a mother suing under the Civil Rights statutes for damages allegedly resulting from a conspiracy to take away her minor child, the Court denied the mother's right to recover thereunder in the absence of any evidence of common law conspiracy or conspiracy to deprive the mother of her constitutional rights. In the instant case, the fact that several public officials and employees performed acts which led to Michael's transport to Germany, evidences not a conspiracy but merely the acts necessary and proper by each of the Petitioners to implement a valid State Court order rendered in Michael's interest.

While it is conceded that matters concerning immigration and deportation of aliens are within Federal jurisdiction, aliens nonetheless are held to be subject to the general laws of the states in which they reside, at least to the extent that such laws do not infringe

upon federally preempted matters. "A state has authority to make reasonable classifications (of aliens) . . . and it has been stated that 'reasonable classification' implies action consistent with the legitimate interests of the state": See 3 Am.Jur.2d at page 902. It is clear from the facts herein that Michael's placement was made in his own interest and pursuant to a legitimate state interest and in that regard, it must be submitted that the placement of Michael in Germany with his legal guardian grandparents was in no way the "unlawful deportation" Morrison has alleged.

B. The Damages Alleged by Respondent Are Not Recoverable in a Federal Civil Rights Action.

In her First Amended Complaint, Morrison has alleged damages of emotional distress resulting from the alleged acts of the Petitioners and the loss of consortium of her child. It has been held that claims for emotional distress are not actionable under Federal Civil Rights statutes: see *Dear v. Rathje,* 391 F.Supp. 1 (1975).

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and those portions of the opinion of the Ninth Circuit as affect these Petitioners.

Respectfully submitted,

ARTHUR W. VANCE, JR.,
KINKLE, RODIGER AND SPRIGGS,
Professional Corporation,
Counsel for Petitioners.

APPENDIX.

Opinion.

United States Court of Appeals, for the Ninth Circuit.

Waltruent Margarete Rosa Morrison, Plaintiff-Appellant, v. William E. Jones, Donald L. Schroeder, Clayton Record, A.A. Younglove, Byron C. Morton, District Attorney for the County of Riverside, Paul R. Wiley, Director, and the Department of Public Social Services for the County of Riverside, Donald D. Sullivan, Clerk of the Superior Court for the County of Riverside, Edward T. Himeno, M.D., Defendants-Appellees. No. 77-1066.

Filed: Oct. 19, 1979.

Appeal from the United States District Court for the Central District of California.

Before: BRIGHT,* HUFSTEDLER, and ANDERSON, Circuit Judges PER CURIAM:

Morrison brought this civil rights action (42 U.S.C. §§ 1981, 1983) against the Board of Supervisors of the County of Riverside ("Board") and other named county officials who caused her minor son, Michael, a dependent ward of the Juvenile Court, to be transported to Germany, in violation of her constitutional rights. The district court granted summary judgment in favor of the defendants on the ground that each of the defendants was immune from liability. The defendants reassert their claims to immunity, and they argue, in addition, that Morrison had no standing to maintain the action, that she failed to exhaust her state remedies, that exclusive jurisdiction resided in the state court

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*Honorable Myron H. Bright, United States Circuit Judge, Eighth Circuit, sitting by designation.

system, and that her amended complaint stated no claim for relief. We affirm the district court's grant of summary judgment in favor of Byron C. Morton, District Attorney, and Donald D. Sullivan, Clerk of the Superior Court, because both of them, under the circumstances of this case, are protected by absolute quasi-judicial immunity. We reverse summary judgment in favor of the remaining defendants.

Morrison is a German alien married to an American citizen. Her natural son, Michael, is also a German alien. On July 16, 1970, when Michael was eight years old, he was sent by his grandparents, with whom he was living, to reside with his mother. From that time until his return to Germany, Michael was a lawful resident of the United States. According to Morrison, Michael was ill when he arrived. He "didn't play, sat for hours, paced in a square, weighed 38 pounds; . . . and was not taught to dress himself . . ."

On November 11, 1972, Morrison had Michael admitted to the Children's Psychiatric Unit at Riverside General Hospital ("Hospital"), where the child was diagnosed as suffering from childhood schizophrenia with severe nutritional and emotional deprivation. On several occasions after his commitment, Morrison tried unsuccessfully to remove Michael from the care of the Hospital.

In December, 1972, the Hospital caused a petition to be filed in the California Superior Court, Riverside County, Juvenile Department, alleging that Michael was in need of proper care and control and that he had no parent capable of providing care and control. The record before us does not indicate the grounds supporting the dependency petition. On January 12, 1973, after notice to Morrison and a hearing, Michael

was adjudged a dependent child of the court pursuant to section 600(a) of the California Welfare and Institutions Code. Michael was placed by a court order at the Children's Psychiatric Unit of the Hospital.

Morrison continued her efforts to recover custody of the child and to remove him from the Hospital. During the course of successive review hearings, commencing on July 13, 1973, the antagonism between Morrison and David W. Swan, a social worker for the Department of Public Social Services, became evident.[1] In each of these review proceedings, Michael was continued as a ward of the court and his placement remained at the Hospital.

Michael was briefly returned to his mother, but upon the report that Michael's physical condition had deteriorated, Michael was removed from his mother's home on November 8, 1974. At a hearing shortly after Michael's return to the Hospital, Mr. Swan reported to the court that the hospital staff was "recommending that Michael be returned to the home of his grandparents in Germany. He is apparently still a German citizen, his grandparents are anxious to have him re-

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[1]For example, Mr. Swan's report, presented at the review hearing on July 13, 1973, said: "If Mr. and Mrs. Morrison continue to exhibit an uncooperative attitude toward the hospital, the hospital staff will probably recommend that Michael should not return to their home when he leaves the hospital."

Again, in the review hearing set for January 11, 1974, Mr. Swan reported the Morrisons' "lack of cooperation." He wrote: "For several months after Michael's placement at Riverside General Hospital, Mrs. Morrison was upset about his placement and did not cooperate with the treatment planned for him. At the present time, she and her husband are cooperating with the program although she is still anxious to have Michael return to her home and she exhibits a fear of signing any forms that pertain to Michael unless she is positive that she understands them . . . [S]he said that the last time she signed a form at Riverside General Hospital, Michael was removed from her home."

turned to them and they appear to be capable of arranging to meet his needs. Mrs. Morrison has indicated that she wants to have Michael returned to her home, but she would rather have him returned to his granparents than remain in the hospital." In the Juvenile Court's order recommitting Michael to the Hospital, the court included, as an alternative to placement in the Hospital, residence with Michael's grandparents in Germany.[2]

On March 25, 1975, the Director of Public Social Services requested the County Board of Supervisors for Riverside County to approve funds to transport Michael, accompanied by an adult, to Germany. The Board approved the travel request and continued the fund transfer portion of the request until April 1, 1975, at which time the transfer of the necessary funds for transportation of the dependent child, and an adult companion, was authorized by the Board. No notice of either of these actions was ever given to Morrison by the Board.

According to Morrison, she first learned that county officials were going to transport her child to Germany when she read a newspaper story in the Riverside Daily Enterprise, dateline March 27, 1975, entitled "Youngster's Illness to Bring First Paid Trip Abroad by County Employe [sic]."[3]

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[2]The notation of potential placement of Michael with his grandparents in Germany was made by handwriting. Morrison has averred that this modification of the dependency order was not communicated to her at any time. The record contains no evidence that the minute order was served on her.

[3]The news story quoted Paul R. Wiley, Director of Public Social Services, as advising the Supervisors that "the child's care costs $169. "a day—more than $60,000 a year," but "[t]he cost of the one-way trip for the boy and a round trip for Allen [his therapist] will be about $1,500." The story also quoted Dr. Himeno, Director of the Children's Psychiatric Unit at Riverside General Hospital, as describing Michael as "very disturbed" and "extremely taxing for anyone to cope with." The same article stated, "Himeno urged his early return to Germany 'because he is taking valuable bed space on the unit and we do have patients waiting to be admitted once he is discharged.' "

After she read the newspaper article, Morrison for the first time obtained a lawyer, who filed on her behalf a writ of prohibition with the Superior Court of the County of Riverside to prevent Michael's deportation. The alternative writ was granted on April 3, 1975, directing Mr. Wiley to "desist and refrain from any further proceedings in the said action . . . until further order of this court thereon . . ." A hearing date was set for consideration of Morrison's request for modification of the December 27, 1974, dependency order. The cause was set for a contested hearing on May 1, 1975. The court also ordered a stay of the prior court order, permitting Michael's placement in Germany, until completion of the hearing scheduled for May 1, 1975, and until further order of the court. Because the prior petition for a writ of prohibition thereby became moot, the petition for the writ was dismissed.

The contested hearing was held on May 1, 1975, before Judge Gerald F. Schulte, juvenile court judge. On May 5, 1975, Judge Schulte denied Morrison's motion for termination of dependency and for physical custody of Michael. Neither Morrison nor her lawyer was given any notice of the May 5, 1975, order. On May 9, 1975, Michael was transported to Germany. Morrison first learned that Michael has been sent to Germany when she received a note signed by Mr. Swan of the Department of Public Social Services which,

in its entirety, states: "This letter is to notify you that on Friday, May 9, 1975, Michael left the hospital to return to his grandparents' home in Germany."

Morrison filed a timely notice of appeal from the order of May 5, 1975. The appeal was later voluntarily dismissed.

Morrison filed this action in the district court on August 21, 1975, and she filed an amended complaint on November 26, 1975. The named defendants are William E. Jones, Donald L. Schroeder, Clayton Record, A. A. McCandless, and A. Norton Younglove, all members of the Board; Paul R. Wiley, Director, Department of Public Social Services for the County of Riverside; Byron C. Morton, District Attorney for the County of Riverside; Donald D. Sullivan, Clerk of the Superior Court for the County of Riverside; Department of Public Social Services for the County of Riverside; and Edward T. Himeno, M.D., Director of Child Psychiatry of the In-Patient Unit, Riverside General Hospital.

I

The district court correctly granted summary judgment in favor of the District Attorney, Byron C. Morton, and the Clerk of the Superior Court, Donald D. Sullivan. The record reveals that Morton's only participation in the events of which Morrison complains was the presentation of evidence at the contested hearing on May 1, 1975. He is clothed with absolute quasi-judicial immunity because his "challenged activities [were] an 'integral part of the judicial process.' " *Imbler v. Pachtman*, 424 U.S. 409 (1976).

No averments of the amended complaint, supported by any evidence in opposition to the motion for summary judgment, charged Donald D. Sullivan, Clerk of the Superior Court, with any act or omission that caused injury to Morrison. At best, she has charged him with some kind of responsibility for her failure to receive notice of the May 5, 1975, order. His failure, if any, to perform a ministerial duty which was a part of judicial process is also clothed with quasi-judicial immunity. *Cf. Denman v. Leedy*, 479 F.2d 1097 (6th Cir. 1973); *Smith v. Rosenbaum*, 460 F.2d 1019 (3d Cir. 1972). *See also Schuman v. State of California*, 584 F.2d 868 (9th Cir. 1978); *Gillibau v. City of Richmond*, 417 F.2d 426, 429 n.4 (9th Cir. 1969). *Cf. Stewart v. Minnick*, 409 F.2d 826 (9th Cir. 1969).[4]

We cannot sustain the district court's holding that the remaining defendants were immune.

When the district court ruled that the Department of Social Services for the County of Riverside was immune from civil rights liability, the district court did not have the benefit of *Monell v. Department of Social Services*, 436 U.S. 658 (1978). The Supreme Court held that local governmental bodies were not wholly immune from section 1983 liability. The Court also observed that state law immunities, upon which the district court relied, cannot override a section 1983 cause of action. *See also Donovan v. Reinbold*, 433 F.2d 738 (9th Cir. 1970).

The members of the Board were not absolutely immunized from liability. The state statutory immunity afforded by California Government Code § 820.2 is

[4]Judge Gerald F. Schulte, initially named as a defendant, was absolutely immune. Stump v. Sparkman, 435 U.S. 349 (1978). Morrison has not appealed from the judgment dismissing him from the action.

inapplicable. *Monell v. Department of Social Services, supra,* 436 U.S. 658. The Board's reliance upon our holding in *Hoffman v. Halden,* 268 F.2d 280 (9th Cir. 1959) is misplaced. *Hoffman* has been overruled by a long line of Supreme Court cases beginning with *Scheuer v. Rhodes,* 416 U.S. 232 (1974). *E.g., Navarette v. Procunier,* 434 U.S. 555 (1978); *Wood v. Strickland,* 420 U.S. 308 (1975); *O'Connor v. Donaldson,* 422 U.S. 563 (1975).

As an alternative ground for supporting the summary judgment, the Board members suggest that they are entitled to the absolute legislative immunity of *Tenney v. Brandhove,* 341 U.S. 367 (1951). The Supreme Court has never decided whether individuals performing legislative functions on the purely local level should be afforded this type of absolute immunity, or whether they are entitled only to the qualified immunity allowed executive officials. *Lake Country Estates v. Tahoe Regional Planning Agency,* ..... U.S. ....., 59 L.ed. 2d 401, 412 n.26 (1979). We do not have occasion on the record before us to reach the issue because the record is too poorly developed to permit us to decide whether any or all of the acts attributed to the members of the Board were done in a legislative capacity.

On the fragmentary record before us, the members of the Board can claim no more than the qualified immunity afforded to executive officers upon standards laid down by the Supreme Court in *Scheuer v. Rhodes, supra,* and its spawn. The record is entirely inadequate to establish the subjective and objective elements of the good faith standard established by the Supreme Court. *Wood v. Strickland, supra,* 420 U.S. at 313-14, 321-22. *See also Navarette v. Procunier, supra,* 434 U.S. at 561-62; *Thomas v. Younglove,* 545 F.2d

1171, 1172-73 (9th Cir. 1976); *Lokey v. Richardson,* ..... F.2d ..... (9th Cir. 1979) [slip op'n July 11, 1979, at 2515].

Paul R. Wiley, Director of the Department of Social Services, is an executive officer, and he can only avail himself of the qualified immunity of *Scheuer v. Rhodes, supra.* Himeno, Director of Child Psychiatry of the In-Patient Unit at the Hospital, enjoys no greater immunity than Wiley. *O'Connor v. Donaldson, supra,* 422 U.S. 563.

Each of these defendants suggests that he was immunized from liability because he was relying upon the court order dated May 5, 1975. The record, in its present state, does not support the contention. None of the defendants was ordered to transport Michael to Germany. None of the defendants, with the possible exception of Wiley, was authorized to change Michael's custody. In pertinent part, the minute order provided: "That the minor continue under the care, custody and control of Paul Wiley, Director of the Department of Public Social Services," and "[t]hat the existing commitment to the Children's Psychiatric Unit at the Riverside General Hospital remain in effect; except that as an alternative placement the minor may be placed by the director with the minor's grandparents in Germany." Furthermore, with some support in the record, Morrison avers that the May 5 order was effectively stayed by the earlier order of the court granting a stay "until further order of the court." The May 5 order said nothing about the prior stay. In addition, California Code of Civil Procedure § 917.7 provides an automatic stay by operation of law for 30 days from the entry of a judgment or order of the Juvenile Court "allowing or eliminating

restrictions against removal of the minor child from of state."[5]

II

None of the procedural arguments advanced by the defendants to uphold the summary judgment have merit.

The contention that Morrison does not have standing to sue because she is merely asserting the rights of her child is frivolous. Morrison is not attempting to assert Michael's rights not to be transported to Germany. Rather, she is asserting her interest as the mother of the child to preserve her access to the child and her access to effective judicial relief, which, she alleges, the defendants' conduct destroyed. The defendants' alleged actions unquestionably caused injury to Morrison with respect to her relationships with her son. Those interests, based on familial concepts, recognized by custom and practice for generations, are protected under the Constitution. *E.g., Stanley v. Illinois,* 405 U.S. 645 (1972) (constitutionally protected interests of parent in custody of his or her child); *In re Gault,* 387 U.S. 1 (1967) (right of parents to receive notice of state juvenile delinquency proceedings against their child). Morrison's injury in fact to her recognized legal interests is enough to grant her standing. *E.g., Data Processing Service v. Camp,* 397 U.S. 150 (1970).

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[5]Because the May 5 order did not order removal of the child from the state and his transportation to Germany, we do not have occasion to decide whether an order that purported to transport the child out of the United States would have been valid.

Nothing in Welfare and Institutions Code §§ 368 and 738 authorizes a Juvenile Court to transport Michael to Germany because Michael, at the time of the order, was a resident of California, his mother was a California resident, and Wiley, in whose custody Michael was placed, was also a California resident.

The contention that Morrison's action was defeated because she failed to exhaust her state remedies is also legally frivolous. She was not required to exhaust her judicial or administrative remedies before she brought her civil rights action. *McNeese v. Board of Education,* 373 U.S. 668 (1963); *Monroe v. Pape,* 365 U.S. 167 (1961); *Lane v. Wilson,* 307 U.S. 268 (1939); *Home Telephone & Telegraph Co. v. City of Los Angeles,* 227 U.S. 278 (1913); *Whitner v. Davis,* 410 F.2d 24 (9th Cir. 1969).[6]

Equally unavailing is defendants' contention that the exclusive jurisdiction of Morrison's action lies in the state courts of California. Morrison is asserting federal rights secured by both the federal Constitution and federal statutes, and she is not relegated to the state court system to vindicate any of those claimed federal rights.

III

Finally, the defendants argue that Morrison's amended complaint stated no claim against any of them upon which relief could be granted. Morrison's amended complaint was inartfully drafted, but we are required to construe complaints under the Civil Rights Act liberally. *Thomas v. Younglove, supra,* 545 F.2d 1171; *Marshall v. Sawyer,* 301 F.2d 639 (9th Cir. 1962). As we pointed out in *Marshall v. Sawyer,* the "only elements which need to be present in order

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[6]The defendants' argument that Morrison has remedies to exhaust is particularly ironic because, according to the averments of the complaint, the defendants' own actions placed Michael beyond the reach of any process that either the state or the federal courts could issue, and, of course, the child's German grandparents were never subject to the processes of the courts of the United States.

to establish a claim for damages under the Civil Rights Act are that the conduct complained of was engaged in under color of state law, and that such conduct subjected the plaintiff to the deprivation of rights, privileges, or immunities secured by the Constitution of the United States." *Id.* at 646.

It is undisputed that each of the defendants acted under color of state law. At this preliminary stage of the proceedings, we cannot say that she has failed to state a claim for relief based upon her constitutionally secured rights to procedural due process of law and her substantive familial rights that have long been considered the "basic civil rights of man." *Skinner v. Oklahoma,* 316 U.S. 535, 541 (1942). "The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, *Meyer v. Nebraska, supra,* [262 U.S. 390] at 399, the Equal Protection Clause of the Fourteenth Amendment, *Skinner v. Oklahoma, supra,* at 541, and the Ninth Amendment, *Griswold v. Connecticut,* 381 U.S. 479, 496 (1965) (Goldberg, J., concurring)." *Stanley v. Illinois, supra,* 405 U.S. at 651.

Nothing we have said suggests that we have any opinion about the ultimate merits of Mrs. Morrison's action.

Affirmed in part, reversed in part, and remanded to the district court for further proceedings consistent with the views herein expressed.

The parties shall bear their own costs on appeal.

Order Amending Opinion and Denying Petition for Rehearing.

In the United States Court of Appeals, for the Ninth Circuit.

Waltruent Margarete Rosa Morrison, Respondent-Plaintiff-Appellant, vs. William E. Jones, Donald L. Schroeder, Clayton Record, A. A. Younglove, Byron C. Morton, District Attorney for the County of Riverside, Paul R. Wiley, Director, and the Department of Public Social Services for the County of Riverside, Donald D. Sullivan, Clerk of the Superior Court for the County of Riverside, Edward T. Himeno, M.D., Petitioner-Defendants-Appellees. No. 77-1066.

Filed: Nov. 26, 1979.

Before: BRIGHT,* HUFSTEDLER and ANDERSON, Circuit Judges.

The Per Curiam opinion filed October 19, 1979, is amended as follows:

At the end of the first paragraph in the right-hand column of the slip opinion, at page 312, and immediately before the paragraph designated as headnote "[7]" the following paragraph is inserted:

> "Dr. Himeno was the Director of Child Psychiatry of the In-Patient Unit at Riverside County General Hospital. The court below found that Morrison had failed to make sufficient allegations that Doctor Himeno had caused any injury or

*The Honorable Myron H. Bright, Senior Circuit Judge for the Eighth Circuit, sitting by designation.

participated in the conspiracy. However, the Complaint alleges that Doctor Himeno recommended to the Board that Morrison's son be sent to Germany since he was taking up valuable bed space. All that Dr. Himeno's affidavit states is that at all times material to the present cause of action, he acted within the scope of his duties as a director of the county hospital. In the absence of any other evidence, we believe that the allegations in the Complaint sufficiently averred participation by Dr. Himeno in the conspiracy to deprive Morrison of her son. Thus, we find that the summary judgment entered as to Dr. Himeno was inappropriate on this state of the record."

As so amended, the petition for rehearing of defendants-appellees is DENIED.

Memorandum of Decision.

United States District Court, Central District of California.

Waltruent Margarete Rosa Morrison, Plaintiff, v. William E. Jones, Donald L. Schroeder, Clayton Record, A. A. McCandless, A. Norton Younglove, Byron C. Morton, District Attorney for the County of Riverside, Paul R. Wiley, Director, and the Department of Public Social Services for the County of Riverside, Donald D. Sullivan, Clerk of the Superior Court for the County of Riverside, Edward T. Himeno, M.D., Defendants. No. CV 75-2794-FW.

Filed: Sept. 30, 1976.

This is an action for alleged deprivation of Plaintiff's civil rights pursuant to 42 U.S.C. §1983. In substance, Plaintiff by her first amended complaint claims that her son was wrongfully sent by the County of Riverside for placement with his grandparents. She contends that Defendants acted in spite of a stay order issued by the Riverside County Superior Court.

A detailed examination of the record discloses that the Judge of the Superior Court on May 5, 1975, did in fact order that placement in Germany with the grandparents was an alternative to keeping the child institutionalized in Riverside County.

Further, it does not appear from the record that Plaintiff appealed from the Superior Court's original order of December 27, 1974, which first indicated placement in Germany as an alternative for the child. In any event, there was no order of court staying the effect of the aforementioned order of May 5, 1975, providing placement in Germany as an alternative.

In November 1972 Plaintiff voluntarily surrendered her child, now age fourteen, to the care of the Children's Psychiatric Unit of the Riverside County General Hospital. The child was thereafter declared a ward of the Juvenile Court under California Welfare and Institutions Code §600(a). His status as a ward of the court was continued at annual review hearings.

At the December 27, 1974 annual review hearing the Juvenile Court ordered the child to be placed in a "suitable facility." One alternative mentioned in the Court's order was placement in the home of the child's grandparents in Germany.

A request for travel and travel funds was made by the Department of Public Social Services for the County of Riverside. On March 25, 1975, the Riverside County Board of Supervisors (the Board) approved the travel request. Funds for such travel were approved by the Board on April 1, 1975.

On May 5, 1975, the Juvenile Court affirmed its order of December 27, 1974. Pursuant thereto, the child was placed with his grandparents in Germany.

Defendants' respective motions to dismiss for failure to state a claim upon which relief can be granted came on for hearing; the Court stated such motions would be considered as motions for summary jdugment; they thereafter were submitted for decision. Defendants accompanied their motions with affidavits which have been considered by the Court. It is the opinion of the Court that Defendants' motions should be granted for the reasons set forth herein.

Defendants Jones, Schroeder, Record, McCandless and Younglove are members of the Riverside County Board of Supervisors. By affidavit they assert all acts

performed by them were within the scope of their public office. State government officials are immune from liability under the Civil Rights Act for discretionary acts done within the scope of their authority. *Hoffman v. Haldin,* 268 F.2d 280 (9th Cir. 1959). Further, California Government Code §820.2 confers immunity upon public officials for discretionary acts. These Defendants are therefore entitled to summary judgment.

Defendant Byron C. Morrison, District Attorney for the County of Riverside, asserts by affidvit that at all times he was acting within the scope of the authority of his office. In *Imbler v. Pachtman,* 424 U.S. 409 (1976), the United States Supreme Court held that public prosecutors are immune from damage suits based on acts performed within the scope of their office. Defendant Morton is therefore entitled to summary judgment.

Defendant Donald D. Sullivan, Clerk of the Superior Court of the County of Riverside, states by affidavit that at all relevant times he was acting within the scope of his duties. Court clerks serve a quasi-judicial function and so are entitled to immunity from suit based on acts performed in implementing orders and decisions of the courts. *Stewart v. Minnick,* 409 F.2d 826 (9th Cir. 1969). Defendant Sullivan is therefore entitled to summary judgment.

Defendant Edward T. Himeno, M.D., is Director of Child Psychiatry of the In-Patient Unit at Riverside County General Hospital. He asserts that his diagnosis of Plaintiff's son was performed within the scope of his duties as Director. Public employees are not exonerated from liability for injury proximately caused

by their negligent acts or omissions, California Government Code §854.8(d). However, Plaintiff fails to allege facts which would support a finding that Defendant's diagnosis was conducted negligently or in any way caused Plaintiff's injury. Defendant Himeno is therefore entitled to summary judgment.

Defendant Department of Social Services for the County of Riverside is a public entity as defined by California Government Code §811.2. Public entities are immune from liability for injuries. California Government Code §815(a). Such Defendant is therefore entitled to summary judgment.

Defendant Paul R. Wiley, Director of the Department of Public Social Services, asserts by affidavit that at all relevant times he was acting within the scope of his office. It is the opinion of the Court that he shares the immunity of the public entity which he serves. Defendant Wiley is therefore entitled to summary judgment.

It should be noted that there is nothing in the record that indicates that any Defendant acted with malice, express or implied.

The foregoing is a summary of the undisputed material facts and conclusions of law of the Court. Judgment shall be entered accordingly for Defenants, but no judgment shall be entered until a formal judgment has been signed and filed by the Court.

DATED this 29th day of September, 1976.

FRANCIS C. WHELAN
UNITED STATES DISTRICT JUDGE